No. 633

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IN THE

# Supreme Court of the United States

December Term, 1940

MICHAEL PECORARO and SAM GROSS,

Petitioners,

—*against*—

THE UNITED STATES OF AMERICA,

Respondent.

## *PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.*

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Law Brief Press

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*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioners respectfully represent:

**A. Summary and Statement of Matter.**

An indictment (R. pp. 17-32 inclusive) was filed on October 31st, 1939, charging petitioners, and thirty-nine other defendants, with having conspired to violate Title 26, United States Code, Sections 1320-A, 1322, 1162, 1152-A, 1182, 1184 and 1185, and Title 5, United States Code, Sections 281 to 281-E inclusive and the acts amendatory thereof and the regulations duly promulgated thereunder, and Title 26, United States Code, Section 1162-A and the acts amendatory thereof and the regulations duly promulgated there-

under known as Regulation 17, approved December 23, 1935 and Regulation 92, approved December 28th, 1935.

Forty-one defendants are named in the indictment (R. pp. 31-32). The indictment was severed as to nine of the defendants (R. p. 35), twenty-six pled guilty before or during the trial and the remaining defendants continued through the trial. Seven defendants including the petitioners were found guilty after trial and nine defendants were acquitted (R. pp. 616, 617).

It appears that the theory of the prosecution is that the petitioner, Pecoraro, supplied the sugar and that Franzone, a co-defendant, as to whom the indictment was severed, was working at the still in Belleport "for the interests of" Pecoraro and that Pecoraro carted alcohol from the still (R. pp. 97, 98, 99); that Petitioner, Gross, supplied completely denatured alcohol called "Anti-Freeze" to the distillers, without filing the proper notices pursuant to the regulations (R. p. 209).

On appeal to the Circuit Court of Appeals for the Second Circuit, petitioners asserted that no proof was established to show their participation in the conspiracy. The testimony discloses that petitioner, Pecoraro, had been to the Herth Farm still for the purpose of collecting money (R. p. 98) and that during a period of sixteen days, he had carted alcohol from the still with the supposed aid of Franzone, who was alleged to have stated to Herth, a government witness at whose farm the still was found, that he was there "in the interests of" Pecoraro (R. pp. 97, 98, 99).

The record further discloses that seventeen of the eighteen drums of "Anti-Freeze" originally consigned to Gross, were found at the Herth Farm (R. p. 209) and that no report of the disposition of this product was made, prior to the seizure of the still, to the Alcohol Tax Unit pursuant to the regulations (R. pp. 325, 326, 327). There is further testimony that Gross had on one occasion after the still

at the Herth Farm was seized, appeared there with a party by the name of Rodono. However another government witness named Musso, testified that he could not identify Gross as the person who appeared with Rodono (R. pp. 380, 381, 389, 390, 394, 395, 482, 483). The record also discloses that Gross had made a report to the Police Department concerning the robbery of a truck containing his products (R. pp. 283-290 incl.).

The Circuit Court of Appeals rendered its decision and filed its opinion herein on November 4, 1940, wherein it affirmed the judgment of conviction as to the petitioners and reversed as to one other defendant. The Court, in affirming the judgment of conviction, stated, in substance, that Pecoraro's guilt is substantiated by the fact that the evidence as to him went further than to show that he merely sold sugar because he had, during a period of sixteen days, removed alcohol upon which no tax had been paid; that his participation was further substantiated by the fact that one, Franzone, told Herth, a government witness, that he was working "in the interests of" petitioner, Pecoraro.

Petitioner, Gross' conviction was upheld on the basis that the drums originally consigned to him were found at the Herth Farm, that no report of sale of these drums had been made and had such reports been made by Gross, he would have, in effect, disclosed the illegal enterprise, that his failure to report pursuant to the Regulations, in effect shielded the buyers and from this the Court concluded that his stake in the distiller's venture was more than that of an indifferent seller, and that the Jury might have found from the evidence that Gross knew of the illicit use to which the "Anti-Freeze" was being put.

A petition for rehearing was filed on behalf of the petitioner, Gross, and on November 18th, 1940, the Circuit Court of Appeals for the Second Circuit denied the petition for rehearing.

The record is devoid of any proof to show that Pecoraro took an active part in the conspiracy. He was primarily interested in the return of the moneys due him and was indifferent as to the manner in which he was paid (R. p. 98). The most favorable view of Gross' so-called connection shows him to be nothing more than a vendor of materials to an illicit distiller and of having failed to file a report concerning the disposition of such materials pursuant to the Regulations. However the record does not indicate that Gross knew to what use the "Anti-Freeze" was to be put. The proof discloses that Gross did not know where the still was; that he was taken there by Rodono, a co-defendant, who testified for the Government (R. pp. 380, 381, 389, 390, 394, 395) and as to this there is a dispute since another witness testified that he could not identify Gross as the man who appeared with Rodono (R. pp. 482, 483).

It is respectfully submitted that the ruling in this case is inconsistent with the holding in the case of *U. S.* v. *Falcone,* 109 Fed. 2nd 579, decided by the same Circuit Court, wherein the conviction of the defendants who sold to the distillers was reversed on the ground that it was not shown that the defendants had a stake in the outcome of the venture in spite of the fact that they knew that "others will make an unlawful use" of the illegal product.

In that case the Court said at page 581:

> "It is not enough that he (the vendor) does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of

great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills. State ex rel. Dooley v. Coleman, 126 Fla. 203, 170 So. 722, 108 A. L. R. 326 accords with this view."

**B. Jurisdiction.**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1935. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

**C. Question Presented.**

Petitioners herein respectfully assert that the determination of this case by the Circuit Court of Appeals was inconsistent with the determination of what may properly be called an identical case, *U. S.* v. *Falcone,* 109 Fed. (2) 579. In the *Falcone* case, the Court definitely held that the vendor, despite the fact that he knows that others will make an unlawful use of his product, is not a participant in the conspiracy merely by reason of the fact that he sells this product to those persons who intend to put it to an illegal use. That a person, in order to become a participant in a conspiracy, must have a stake in the outcome and must, in a sense, promote the venture. That while morally, the defendant should have refused to sell, legally he could not be joined as a conspirator in the running of the still.

In the instant case, there is no proof that either Pecoraro, or Gross, did anything to promote the venture. Pecoraro is shown to have done nothing more than take alcohol in pay-

ment of a debt due him. He is no different than a purchaser of untaxed paid alcohol. Even if it were conceded that Anti-Freeze found at the still was not stolen from Gross but that he had sold it to the distillers, it can only be said that he is a vendor in the same position as the defendants in the *Falcone* case, *supra*. There is no proof that he ever transported or received any of the alcohol made at the still or that he had a stake or interest in the outcome of the venture.

That by reason of the foregoing the following problems present themselves:

(a) Does the vendor of raw materials to an illicit distiller become a party to the conspiracy by reason of the sale?

(b) Does the failure of a dealer to report a sale pursuant to the regulations without proof as to the knowledge to which the materials sold are being put create the inference that the dealer is participating in a conspiracy to violate the Internal Revenue Laws?

(c) Does an individual by the commission of a substantive offense place himself in the category of a participant to a conspiracy?

**D. Reasons for Granting Writ.**

The primary reason for the consideration of this petition, is that the decision of the Circuit Court of Appeals in this case, is inconsistent with and contradictory to the decision by the same Court in *United States* v. *Falcone, supra.*

Petitioners also assert that the decision in this case is inconsistent with the decision of the same Court in the *United States* v. *Peoni,* 100 F. (2) 401 (2nd Circuit) and with the determination of the Circuit Court of Appeals in the case of *Copeland* v. *United States,* 90 Fed. 2nd, 78 (5th Circuit),

where, on the basis of circumstances which would have justified a greater degree of suspicion against the defendant, it was held that suspicion of guilt was not an adequate substitute for proof of guilt.

Furthermore, in the case of *United States* v. *Dellaro,* 99 Fed. 2nd, 781 (2nd Circuit), the Court held that a person to become a party to a crime must "affirmatively unite oneself with the venture, or, in the case of conspiracy, must agree to take some part in it", and in the case of *Turcott* v. *United States,* 21 Fed. 2nd 829 (5th Circuit), the Court held that active participation must be established and mere knowledge of illegal acts of others is not sufficient.

In the case at bar, the proof adduced by the respondent, may have shown the commission of some substantive offense, but that is not sufficient to show a participation in the conspiracy.

WHEREFORE, Petitioners pray that a writ of *certiorari* may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed and that petitioners may have such other relief as this Court may deem appropriate.

Dated, December 13th, 1940.

MICHAEL PECORARO
SAM GROSS
Petitioners.

By LOUIS HALLE,
Counsel for Petitioners.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

LOUIS HALLE, being duly sworn deposes and says, that he is counsel for the petitioners; that he is familiar with the facts of this case; that he has read a copy of the transcript of record which accompanies this petition; being the transcript of record in the case at bar.

That he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief; and that in his opinion the petition is well founded and the case is one in which the prayer of the petitioners should be granted by this Court.

LOUIS HALLE.

Sworn to before me
this 13th day of December, 1940.

(Seal)

GUSTAVE HALLE
Notary Public, Kings Co. No. 544, Reg. No. 1253,
Cert. filed in N. Y. Co. No. 879, Reg. No. 1H541,
Commission Expires March 30th, 1941.